IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1401

SECURITY STORAGE COMPANY OF WASHINGTON,
a Corporation, et al.,

Petitioners

V.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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COUNTER-STATEMENT OF THE CASE

In the spring of 1974 a large increase in the number of unemployed persons in the District of Columbia making claims for unemployment compensation caused the District's Unemployment Compensation Fund to drop at a rapid rate. Pursuant to the statute, on June 30th of that year the Unemployment Compensation Board

computed the status of the fund and found it to be below 4 per centum of the total payrolls subject to the Act.

Following the requirements of the Statute the Board notified each employer that the tax rate would be raised by 1.5 per centum. Each employer was given notice and an opportunity to contest the rate raise. No employer contested the raise.

During the year 1975 the unemployment compensation claims continued to increase and on June 30th of that year the Board found the fund to be so low as to cause the rate of all employers to be raised to the statutory maximum of 2.7 per centum for the third and fourth quarters of that year. Again, each individual employer was given the opportunity to contest the rate raise. The petitioners herein noted an appeal to the rate raise and an administrative hearing was held. A decision by the Rate Review Committee holding the raise to be proper was not appealed.

In August 1975 the Petitioners filed a complaint seeking injunctive relief and a declaratory judgment as to the propriety of the rate raises. Subsequently the Petitioners amended the pleadings so as to seek refunds for the year 1974. A temporary restraining order was granted the Petitioners and on September 30, 1975 a preliminary injunction order was granted; this was appealed to the Court of Appeals. On October 21, 1976 the Court of Appeals entered a decision holding the Board's action in raising the tax rate to be in accord with the statute. Petitioners filed a Petition for a rehearing or a Hearing En Banc which was denied. This Petition for a Writ of Certiorari followed.

ARGUMENT

A. Neither the Court of Appeals nor the trial court denied Petitioners due process of law.

Petitioners contend that it has been afford-

ed no hearing on its alleged constitutional arguments. Respondent submits first that Petitioners' two main arguments in the trial court were:

1. Statutory construction, and
2. D.C. Administrative Procedure Act.

The 'due process' argument was barely alleged in the original complaint and was not expanded upon thereafter. The trial court's preliminary injunction ruling was based entirely upon the statutory construction argument. In a subsequent hearing, on October 10, 1975, counsel for Petitioners stated:

> There are other issues in the case on which Your Honor can decide in our favor.

Judge McArdle responded:

> I have ruled in your favor, Mr. Hauhn. (sic) Let me say this. It may be I misled you, but if I thought the other issues were one that I would rule in favor of I would have ruled in favor of.

It is thus apparent that the trial court did consider Petitioners' other arguments but did not

agree with them. The mere fact that the court did not address the alternate arguments in its order does not mean that Petitioners were denied a hearing on those arguments.

Inasmuch as Petitioners did not raise the other arguments on appeal, but only after the Court of Appeals reversed, it is no wonder that the Court of Appeals addressed only the issue of statutory interpretation in its decision.

Respondent further contends that the Court of Appeals, in deciding the merits of the case, followed the example of the U.S.Court of Appeals in Delaware & Hudson v. United Transportation Union, 147 U.S. App.D.C. 142, 450 F.2d 603 (1971) and also this Court in Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579, 72 S.C. 863, 96 L.Ed. 1153 (1952) in which this court held that if a matter is ripe to be decided on its merits, the Court may do so even if the matter has reached only the preliminary stage. In the instant case, the matter was ripe for a deter-

mination on the merits. The heart of Petitioners' case was that the Board had incorrectly interpreted a tax statute and had thus illegally deprived it of its property. It therefore follows that a correct interpretation by the Board would not result in a deprivation of property. The legality of the statute itself was not in question. This Court had long ago approved Congress' power to tax employers under the Unemployment Compensation Acts. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937). The Court of Appeals' decision that the Board correctly enforced the taxing provision thus ended the matter and disposed of Petitioners' due process claim.

B. Respondent did not violate the District of Columbia Administrative Procedure Act.

Respondent first submits that there was no violation of the D.C.Administrative Procedure Act. The statute under which the Board acted was a plain requirement set forth by the Congress.

When the unemployment fund reached a certain low level, the statute required that the rate of contribution for all employers be raised. The Board's only function, therefore, was to mechanically take a reading of the fund and then to notify employers of future rates. Petitioners did not dispute the Board's reading of the fund. Petitioners, however, did contend that the Board's action constituted an interpretation of the law, an action of "ruling-making" under the District of Columbia Administrative Procedure Act. Respondent submits that there was nothing to interpret. The statute was clear; a mechanical reading of the fund was taken and new rates were put into effect. The Board not only mailed individual notice of the new rates to each and every covered employer in the District of Columbia but also gave each employer the right to file an administrative appeal of the rate raise as required by D.C. Code 46-303 (c)(10). In 1974 when the emergency tax rate was first put into effect, no employers

requested the administrative rate review; in 1975 only Petitioners filed for an administrative hearing.

C. Even if the Board failed to follow the District of Columbia Administrative Procedure Act, Petitioner was not deprived of any constitutional right.

The District of Columbia Administrative Procedure Act, D.C.Code § 1-1505(a) states:

> "(a) The Commissioner and Council and each independent agency shall, prior to the adoption of any rule or the amendment or repeal thereof, publish in the District of Columbia Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice. The publication or service required by this subsection of any notice shall be made not less than thirty days prior to the effective date of the proposed adoption, amendment or repeal, as the case may be, except as otherwise provided by the Commissioner or Council or the agency upon good cause found and published with the notice.

Title 1, Sec. 1502 of the same Act under the heading Definitions states:

. . . .

(6) the term "rule" means the whole or any part of any Commissioner's Council's, or agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization procedure, or practice requirements of the Commissioner, Council, or of any agency;

(7) the term "rulemaking" means Commissioner's, Council's or agency process for the formulation, amendment, or repeal of a rule.

This is in contrast to the Federal Administrative Procedure Act, which states (U.S.Code Title 5 § 553):

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
>
> (1) a statement of the time, place, and nature of public rule making preceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms of substance of the proposed rule or a description of the subjects and issues involved.

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy or rules of agency, organization, procedures, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. (emphasis added)

The immediate difference to be noticed between these statutes is that the Federal law does not require interpretative rules to be published in the Federal Register whereas the District of Columbia does require interpretive rules to be published in the District of Columbia Register. Assuming that the Board interpreted a statute and did not publish such interpretation in the District of Columbia Register, this violation could not deprive the Petitioners of a due process right; to hold otherwise would be to say that the Federal Administrative Procedure Act is unconstitutional as it does not require

the publication of interpretive rules. Courts have not only upheld the Federal Administrative Procedure Act on numerous occasions but have in fact held interpretive rules not to be binding on the Courts. American President Lines v. Federal Maritime Commission, 114 U.S.App. D.C. 418, 316 F.2d 419 (1963) It cannot be held that the failure to file a rule which does not even have a binding effect is a deprivation of a due process right.

The Board's action, if rule making at all, can be classified as only interpretive rule making. The Board has no rule making authority. No such authority was delegated to the Board by Congress. The statute under which the Board acted (D.C. Code, Title 46, § 3(c)(4)(B) was enacted by Congress. The action of the Board was not legislative rule making in any sense. See K. Davis Administrative Law Treatise (1960) Sections 5.03 and 5.04.

Petitioners argue that because the Board did not follow the statute that it has been

deprived of a constitutional right. This is not the law. A statute may require a more stringent standard than that necessary to meet the requirements of the Fifth or the Fourteenth Amendments due process clauses. However, a failure to meet the more stringent requirement of the statute does not give rise to a violation of a constitutional right. Washington v. Davis 426 U.S. 229, 96 S.Ct. 2040 (1976) A violation of a constitutional right may in fact also be a violation of the Administrative Procedure Act but a violation of an Administrative Procedure Act is not in and of itself a violation of the Constitution.

CONCLUSION

The decision of the D.C. Court of Appeals which the Petitioners seek to have this Court review is correct. There is no violation of any due process right of the Petitioners. A violation of the District Administrative Procedure Act, if in fact a violation occurred,

is not, in this instance, a violation of a constitutional right.

Respectfully submitted,

Bill L. Smith

Bill L. Smith

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the District of Columbia Court of Appeals have been mailed, postage prepaid, to Gilbert Hahn, Jr., Esq. 11th Floor, 1150 Connecticut Avenue, N.W., Washington, D.C. 20036, Attorney for Petitioners

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